No. 544

In the Supreme Court
of the
United States
October Term, 1938

THE UNITED STATES OF AMERICA,
vs.
EDWARD H. MARXEN, Trustee of Monterey Brewing Company, a corporation, Bankrupt.

On Certificate From the United States Circuit Court of Appeals for the Ninth Circuit.

Brief of Trustee, Appellee

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Introduction

The Appellant's brief under "QUESTIONS PRESENTED," sets forth the facts. This brief will be limited, under the question "certified" by the United States Circuit Court of Appeals, Ninth Circuit to this Honorable Court, under Point 3 of said brief, to wit:

"Whether the Government's claim is entitled to priority under Section 64b (7) of the Bankruptcy Act as amended, and Revised Statutes Section 3466." The questions of "Whether the claim filed in the bankruptcy proceedings is a claim of the United States" and "Whether the Government's claim was provable in bankruptcy, where, after the petition in bankruptcy was filed the Government discharged the obligation to the payee of the bankrupt's note and obtained an assignment of the note" will be answered by HARRY LOEB MOSTOW, *amicus curiae.*

Point I.

There Was No Debt Due to the United States Within the Meaning of Section 64(b) of the Bankruptcy Act (11 U. S. C. A. Section 104(b)) and Section 3466 of the Revised Statutes (31 U. S. C. A., Sec. 191) at the Time of Adjudication in Bankruptcy so as to Enable Appellant to Priority Over Other Creditors.

Summary of arguments

The United States not being a creditor of the bankrupt and not having a provable claim in bankruptcy on the date of adjudication and only becoming the owner of the promissory note by reason of an assignment made to the United States by the California Bank four months after adjudication by reason of its contract of insurance with the California Bank under the Federal Housing Act, the United States of America

only became subrogated to the same rights that the California Bank had at the time of bankruptcy, to wit, a general claim at most, and is not entitled to priority within the meaning of Section 3466 of the revised Statutes. There can be no equitable claim in favor of the United States as no privity of contract existed between the bankrupt and the United States at the time of the loan or at any other time.

Argument

The question certified by the United States Circuit Court of Appeals, Ninth Circuit, has never been decided before by this court or any Circuit Court up to the time of certification. The question of whether the United States of America has priority in a bankruptcy proceedings as against other creditors or claimants where, four months after adjudication in bankruptcy the United States took an assignment of a note obligation from a bank which was insured against loss under the Federal Housing Act where the bank would have no priority had it filed a claim in the bankruptcy proceedings, is of vast importance not insofar as it affects this proceedings alone, but in order to establish a uniform decision and final precedent throughout the United States.

The appellant claims priority under Section 3466 of the revised Statutes. To come within the purview of the section the appellant must show that not only is the debt due to the United States but also that the debt was provable and one owing to the United States by

the bankrupt *at the time of the filing of the petition in bankruptcy.* The United States of America in its brief (appendix) has carefully covered certain portions of the National Housing Act vital to this question, and we submit from the act itself, the United States of America was acting thru the Federal Housing Act in the capacity of an *insurer* against credit losses. That the United States did *insure* the bank is apparently conceded by the parties herein.

District Judge Moscowitz in the *matter of T. N. Wilson, Inc.*, 24 Fed. Sup. 651 (E. D. N. Y.) refers to the provisions of title I, Section 2 of the National Housing Administration (12 U. S. C. A., 1701, et seq.) as a contract of insurance executed by the Federal Housing Administrator in favor of the National City Bank insuring the Bank against credit losses which it might sustain as a result of notes purchased or loans thereafter made.

The facts in the case before this court are in direct parallel with those involved in the case of *Federal Housing Administrator vs. Moore, etc.*, Reported in 90 Fed. (2d) 32 (C. C. A., 9th) where a claim for similar preference was denied. In the case of *Wagner, as Trustee vs. Stewart McDonald, Federal Housing Administrator,* reported in 96 Fed. 2nd 273, 8th Circuit, the court held that a claim by the Federal Housing Administrator made in the bankrupt estate was in law that of the United States and hence was entitled to preference in the matter of payment. The marked difference

which is taken note of by the court (8th Circuit) in the *Wagner* case between the facts and the facts in the *Moore* case (9th Circuit) above cited, was that in the *Wagner* case, being considered by the court (8th Circuit), the Housing Administrator *had full title to the claim before Bankruptcy intervened,* the court (8th Circuit) saying:

> "The court in the *Moore* case emphasized the fact that the debt was assigned to the Administrator *after the date of adjudication.* The fact situation is different here."

To hold that the United States has priority where the United States secured the claim by assignment to it after *adjudication in bankruptcy,* would mean to overrule the various United States District Court Judges and decisions by State Courts who have passed directly on the identical question involved in this appeal in the following recently decided cases

It was held *in re Stamford Auto Supply Company,* United States District Court, N. D. Texas, November 30th, 1938, and reported in 25 Fed Supp. p. 530, *that a claim acquired by the Federal Housing Administrator subsequent to the adjudication in bankruptcy of the debtor is not entitled to priority.*" The opinion is as follows:

> "DAVIDSON, DISTRICT JUDGE. The Stamford Auto Supply Company, a partnership, was adjudged a bankrupt on April 10, 1937. About March 19, 1936, the bankrupt executed a note to

the Cimplicity Manufacturing Company, or order, secured by a chattel mortgage. About the 30th of March, 1936, the note was transferred by written assignment to Equipment Acceptance Corporation. On June 21, 1937, the balance due upon the note in the amount of $594.56 was sold and assigned to the Federal Housing Administrator, acting on behalf of the United States of America. The Federal Housing Administration, allegedly acting for the United States, has filed its claim in the bankruptcy proceedings, claiming priority under subsection 7 of Section 64(b) of the Bankruptcy Act, which provides that in case of an insolvent estate the government will have priority for its debts over all other creditors.

"It is the opinion and judgment of the court that the debt is one due the United States and that the Federal Housing Administration is but an agency of the government, charged with the use of certain funds and the performance of certain duties for the government itself. While it is now a debt of the United States it is not entitled to the priority of classification ordinarily given such indebtedness by the Bankruptcy Act. When the Stamford Auto Supply Company was adjudged a bankrupt, the status of its indebtedness was fixed. The debt was not assigned to the Federal Housing Administrator until after the bankruptcy adjudication. The statutes refer only to debts which the government owns at the time that the insolvency or bankruptcy is determined and not to those subsequently acquired. To hold to the contrary would authorize representatives of the various government agencies, by simple act of purchase,

to give one creditor a preference over another, a preference that did not exist at the time a bankrupt was adjudicated as such. The claim will be classified as an unsecured debt only."

Justice Roudebush in the case of *Paul vs. Paul Lighting Fixture Company,* Ohio, Sup. Ct., held on November 30th, 1938, reported in ..... *"that the rights of the creditor are fixed at the time of the receiver's appointment, thus making an assignment from a creditor bank to the United States after the appointment of general claims in the hands of the United States instead of one entitled to priority."* The opinion of the court is as follows:

"ROUDEBUSH, JUSTICE. This cause comes before the court on the intervening petition of the United States in which it seeks priority for a claim in the sum of $2,682.04. The Paul Lighting Fixtures Company borrowed $3,000 from the Peoples Bank and Savings Company on a F. H. A. loan, which means that the bank was insured against loss on the loan by the Federal Housing Administration Act.

"On December 30, 1937, a receiver was appointed for the Paul Lighting Fixtures Company, and the court made an order requiring that all claims against the estate be filed on or before March 1, 1938. On January 27, 1938, the bank filed a claim for the balance due.

"On February 18, 1938, the bank filed a claim with the Federal Housing Administrator for the payment of the balance due on the notes. On

May 5, the administrator allowed the bank's claim; thereupon the bank assigned the two notes to the F. H. A. acting on behalf of the United States. On May 14, the United States district attorney filed claims against the receiver for priority.

"The only question involved in this case is whether the United States Government is entitled to priority in payment of the claim of the Peoples Bank & Savings Company, the receiver having allowed its claim as a general claim but rejected it as a priority claim.

"The rule that the rights of creditors are fixed at the time of the receiver's appointment is clearly established. The assignee stands in the shoes of the assignor and the United States could have no better title than the Peoples Bank & Savings Company.

"Order affirmed."

Justice Millard *in re Dickson,* Wash. Sup. Ct., decided November 30th, 1938, and reported in 84 Pac. (2d) pg. 661, held that where the Federal Housing Administrator paid the bank the unpaid balance on the note *prior to adjudication of insolvency* the United States had priority. The opinion of the court is as follows:

"MILLARD, JUSTICE. On December 5, 1935, Thomas Dickson borrowed $1,066.64 from the Citizens Bank of Bremerton under the terms of the Federal Housing Administration Act. Under the Housing Act, the lending bank was insured against any loss sustained by it as a result of the loan to Dickson.

"On default of Dickson, the Federal Housing Administrator paid to the lending bank by draft on the Treasury of the United States, the unpaid balance due on the note. Thereupon, and *prior to adjudication of insolvency* of Dickson the bank assigned the note to the Federal Housing Administrator. On January 25, 1935, following his application for appointment, J. G. Dickson was appointed guardian of the estate of Thomas Dickson who was adjudged incompetent by reason of insanity.

"An order was entered by the court January 10, 1938, adjudging the estate of the incompetent to be insolvent. The claim of the United States was denied priority and the claim of the state of Washington was allowed priority for occupational and sales tax debts, owed by the incompetent to the state.

"Section 3466, R. S., 31 U. S. C. A. Sec. 191, confers the right of priority. Priority under the statute extends to all classes of debts due the United States. Where the debtor is divested of his property, as in the case at bar, the guardian or person who becomes invested with the title is made trustee for the United States and bound first to pay its debt out of the debtor's property. The priority given to the United States by the statute cannot be impaired or superseded by state law.

"Order reversed."

On September 9th, 1938, District Judge Patterson *in re Miller,* U. S. Dist. Ct., S. D. N. Y., reported in 25 Fed. Sup. 336, held that the assignment of bankrupt's

note by a bank to the Federal Housing Administrator after the filing of the petition in bankruptcy does not operate to give the debt priority as a debt owing the United States. The opinion follows:

> "PATTERSON, DISTRICT JUDGE. At the time of the filing of the petition the bankrupt was indebted to the National City Bank on a note covering a loan made by the bank for housing improvement. The bank was insured against loss by the Federal Housing Administrator. Proof of claim was filed by the bank. Later the Administrator reimbursed the bank, took assignment of the note and filed proof of claim purporting to act in behalf of the United States and claiming priority. The referee held that the claim was entitled to priority under section 64(b) (7) of the Bankruptcy Act and 31 U. S. C. A., section 131 as a debt owing the United States.
>
> "The order granting priority is reversed. It is not necessary to decide whether the debt is one owing the United States. The decisive fact is that the bankrupt did not owe a debt to the Federal Housing Administrator at the time the petition was filed. *The substantive right of a creditor to share in a bankrupt estate depends on the status of his claim at the time the petition was filed.* So too the right of a creditor to priority depends on the situation existing when the petition was filed. The claim should not have been accorded priority."

The decisive fact in the above cases and the one at bar is that the bankrupt did not owe a debt to the United States at the time when the petition in bank-

ruptcy was filed or at any earlier time. The claims in question were, at the time of adjudication in bankruptcy, debts owing to banks or other firms simple debts which would not rate priority under the Bankruptcy Act in favor of the bank or those making the loans. The passing of these claims to the Federal Housing Administrator or the United States or, as in the case before this court, four months after adjudication by assignments after the petition in bankruptcy was filed, did not promote it from the ranks of general creditor to a position of leadership. The rights of creditors both against the bankrupt and among themselves are fixed as of the time when the petition is filed. See *White vs. Stump*, 266 U. S. 310, 313:

> "The substantive right of a creditor to share in a bankrupt estate to any extent depends on the status of his claim at the time when the petition in bankruptcy was filed. *Zavelo vs. Reeves*, 227 U. S. 625; *Williams vs. United States Fidelity & Guaranty Co.*, 236 U. S. 549. So too the right of a creditor to priority over other creditors in the distribution of an estate depends on the situation existing when the petition was filed. *In re Winfield Mfg. Co.*, 140 Fed. 185 (D. C. Pa.) If the claim was one not entitled to priority at that time, a later event will not confer priority. *In re C. H. Earle, Inc.*, 2 Fed. Supp. 15 (D. C. N. Y.), affirmed 65 Fed. (2d) 1013 (C. C. A. 2), certiorari denied 290 U. S. 674. See also *In re Gasteiger & Co.*, 25 Fed. (2d) 642 (C. C. A. 2); *In Re Photo Electrotype Co.*, 155 Fed. 684 (D. C. N. Y.); *In Re Waverly Typewriter* (1898), 1 Ch. 699. Were the rule

otherwise the United States or a state might buy up claims of mere general creditors. The assignment of the bankrupt's note by the bank to the Federal Housing Administrator after the petition in bankruptcy was filed did not disrupt the equality among creditors prevailing at the time the petition was filed."

The administrator is claiming a priority or preference which the bank did not have and which preference was not accorded to the administrator by the law which was a basis of the contract of *insurance* between the bank and the Administrator.

In *Davis vs. Pringle,* 268 U. S. 315, at page 318, it was said:

"The priority claimed by the United States is not given to it by the law."

In considering whether Congress intended to prefer the Administrator in bankruptcy proceedings on debts which might become due him, let us examine the amendments to the National Housing Act enacted by Congress. The amendments to the statute (April 17th, 1936) indicate the intention to exclude the Administrator in the operation of other laws generally.

Section 1703(c) provides:

"Notwithstanding any other provisions of law, the Administrator shall have the power, . . . to collect or compromise all obligations assigned to or held by him. . . ."

Section 1703(e) provides:

"The Administrator is authorized to waive compliance with regulations . . . . with respect to the interest and maturity of and the terms, conditions and restrictions under which loans, . . . may be insured. . . ."

"By the National Housing Act the Administrator could appoint and compensate assistants without regard to the provisions of other laws . . . delegate the powers and functions conferred upon him . . . make expenditures as are necessary . . . without regard to any other provisions of law governing the expenditure of Public funds . . . . could sue or be sued in his official capacity."

The Administrator's claim became provable only after payment by the Administrator to the California Bank and an assignment of the note was made by the bank to the Administrator during the bankruptcy proceedings. The California Bank treated the note and claim as its own until four months after bankruptcy when it assigned the note to the Government. The petition in bankruptcy was filed on April 5th, 1937. No claim was filed by the Federal Housing Administrator until August 4th, 1937.

The appellee submits that the determination of the case at bar must be on the facts as they exist in this case and not on what the facts may or could have been if the Administrator had taken an assignment of the note prior to the filing of the petition as was done in

Wagner vs. McDonald, Federal Housing Administrator, 93 Fed. (2d) 273, and *in Re Dickson's Estate,* 84 Pac. (2d) 661, *supra.* In considering the Appellant's argument that the appellant was the bankrupt's absolute surety on the note it might be well to consider the following facts.

The statute was enacted in June, 1934. The contract of insurance between the appellant and the California Bank was entered into on August 10th, 1934. The bankrupt's note was made on January 2nd, 1936. There was no default until February 2nd, 1937. The petition in bankruptcy was filed April 5th, 1937.

The bank could already have exceeded the quota of losses for which the appellant was liable for indemnification to the bank before the petition was filed in which case there could be no claim for indemnity.

The language *in Re Roth and Appel,* 181 Fed. 667 (C. C. A. 2), (1910), which was a case dealing with liability for future rent after a petition in bankruptcy had been filed, is well applicable to the case at bar. The court said at page 669:

> "It follows from these principles that rent accruing after the filing of a petition in bankruptcy against the lessee is not provable against this bankrupt estate as 'a fixed liability . . . absolutely owing at the time of the filing of the petition,' within the meaning of section 63a (1) of the bankruptcy act of 1898. It is not a fixed liability, but is contingent in its nature. It is not absolutely

owing at the time of the bankruptcy, but is a mere possible future demand. Both its existence and amount are contingent upon uncertain events. (Citing cases.)"

In conclusion, the court said:

> "For these reasons, we think that the claim of the appellant, whether regarded as one for unaccrued rent or for indemnity for loss of rent, was not provable against the bankrupt estate under either section 63a (1) or 63a (4), and was properly expunged by the District Court."

This decision was followed in 291 U. S. 320. In *Zavelo vs. Reeves,* 227 U. S, 625, the United States Supreme Court in referring to Section 63 and its subdivisions, held that in considering the section in question, in light of the spirit and purpose of the acts, debts founded upon open account or upon contract, express or implied, that are provable under section 63a (4) include only such as existed at the time of the filing of the petition in bankruptcy. Mr. Justice Pitney, who delivered the opinion of the court, said:

> "The view above expressed as to clause 4 of section 63a is the same that has been generally adopted in the Federal District Courts."

The Appellee submits the rule that only those debts which have matured and are absolute at the time of the filing of the petition are provable is as equally applicable to claims made by individuals as to claims made by the United States.

The law is stated in *Gilbert's Collier on Bankruptcy*, Second Edition, pages 975-6, that under section 63a (4) the time of the filing of the petition controls and if the debt is owing at that time it may be proved; if not, it is not susceptible to proof.

The filing of the petition in bankruptcy in the case at bar did not establish *ipso facto* a liability on the part of the Federal Housing Administrator to the bank. Certain conditions had to be fulfilled by the bank before it could make claim against the Administrator. Moreover, the bank was not compelled to seek indemnity from the Administrator nor, as has been pointed out, was the Administrator liable to the bank in the event the bank had already exceeded its quota of losses under the statute.

Neither the note nor the so-called contract of suretyship between the bank and the Administrator, provided that the filing of a petition in bankruptcy by the maker matured and made absolute the obligation on the part of the Administrator to indemnify the bank.

In the case of *In re Casualty Company of America, In Re Surety Claim No. 633 of the United States,* 187 N. Y. Supp. 849 (affirmed 232 N. Y. 559), priority was accorded to the Government on a recognizance in a criminal case. There the obligation to the Government was absolute at the time the bond was given. The bond, by its terms, provided that if the principal failed to appear, the surety company would be liable. The obligation to the Government was fixed and absolute

and the time of the occurrence of the breach was not important insofar that pursuant to the provisions of the bond a failure to appear on the part of the principal *eo instante* matured the obligation. The opinion *in re Casualty Company of America, In Re Surety Claim No. 633 of the United States Supra,* decided in April, 1921, and affirmed in December, 1921, stated:

> "Until, therefore, the United States courts or Congress shall establish the rule as held by our state . . . as to claims which have matured at the commencement of proceedings for determining the insolvency of the debtor, this court should, I think, give priority as to all claims of the United States government which have matured prior to the actual distribution of the insolvent's property."

In the above case, the court relied on *Lewis, Trustee vs. The United States,* 92 U. S., pg. 618, cited by appellant in its brief, on page 24.

Four years later in *Davis vs. Pringle,* 268 U. S. 315, also cited by appellant on page 19 of its brief, the Supreme Court of the United States rejected the old rule enunciated in the early cases which gave priority to the United States as a sovereign prerogative, irrespective of the provisions of the statute.

In 1937, in the case of *Continental Illinois Nat. Bank & Trust Co., of Chicago v. Chicago, R. I. & P. Ry. Co., et al.,* 294 U. S. 658, 684, the United States Supreme Court held that where the statute creating

the agency failed by its terms to grant priority or special treatment to the Government's agencies, none would be given by the courts.

The following cases, *Maynard vs. Elliot,* 283 U. S. 273, and *Williams vs. U. S. Fidelity Company,* 236 U. S. 549, enunciated the principle that the filing of a petition in bankruptcy, in effect, caused bankrupt's contingent obligations to mature, and one having a contingent claim against the bankrupt (except for future rent) had a provable claim. These cases did not involve a statement of facts such as in the case at bar where the rights under the independent contract between a creditor of the bankrupt and a third party insurer or indemnitor were fixed not only by contract, but also by a statute (See *In Re Paramount Publix Corporation,* 72 Fed. (2d) 219, and *Central Trust Company vs. Chicago Auditorium,* 240 U. S. 581.)

Justice Holmes, in the case of *Sexton vs. Drayfus, et al.,* 219 U. S., Page 339, decided in January, 1911, said:

> "For more than a century and a half, the theory of the English bankruptcy system has been that everything stops at a certain date. . . . The rule is not unreasonable when closely considered, it simply fixes the moment when the affairs of the bankrupt are supposed to be wound up. . . . At that moment the creditors acquire a right *in rem* against the assets. . . . The rule under discussion fixes the moment in all cases at the date which the petition is filed, . . ."

There is no dispute that the administrator who became subrogated to the rights of the bank against the bankrupt, had the same rights as the bank. The test is whether all the facts necessary to be proved to fasten liability accrued at the time of the filing of the petition. The contingency, in other words, is a contingency of facts to fasten liability at all, not a contingency as to the extent of the damages nor a contingency of the court's judgment on facts.

The Appellee asserts that the filing of the petition in bankruptcy did not, under the contract between the bank and the Administrator, give rights *ipso facto* and *eo instante* to an obligation on the part of the Administrator to reimburse the bank because there was a question of quota of losses first to be demonstrated and secondly it was optional with the bank as to whether it would call upon the Administrator for reimbursement. So long as it remained uncertain whether the contract between the bank and the Administrator would give rise to an actual duty or liability and there was no means of removing the uncertainty by calculation, it was too contingent to be a provable debt in bankruptcy. Neither of these contingencies became dissolved into a certainty by the filing of the petition as is illustrated by the fact that the bank could have filed a claim in its own name and for its own benefit in the bankruptcy proceedings.

Until June 22nd, 1938, at which time Chapter 575, Section 1 (52 Stat. 873) was enacted, there was no pro

vision in the bankruptcy act for the proof of "Contingent Debts and Contingent Contractual Liabilities." If "contingent debts" and "contingent contractual liabilities" were provable and accrued by the filing of the petition in bankruptcy, there would have been no reason for Congress to have inserted in Section 63a the following new matter, to wit:

> "Debts which may be proved . . . . (8) contingent debts and contingent contractual liabilities; . . ."

Moreover, the Administrator is claiming a priority or preference which the California Bank itself did not have and which priority or preference was not accorded to the Administrator by the statute which was the basis for the contractual obligation between the California Bank and the Administrator, whereby the terms and conditions of said contract the United States, acting through the Federal Housing Administrator insured the California Bank against credit losses.

The Federal Housing Administrator is engaged in the business of insuring credits and without questioning the beneficent motive, it is nevertheless engaged in a private endeavor, and as was held in *Sales vs. United States,* 234 Fed. 842 (C. C. A. 2, 1916):

> "When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation."

The case of *Howe vs. Shepard,* 2 Sumner 133, cited by appellant, in its brief on page 22 and page 24

is one where an indebtedness to the United States on duty bonds was involved, and upon which a judgment was entered, the Circuit Court held that the assignment of the Judgment to the United States by Howe and Howard did in equity, transfer the debt to the United States. This apparently is another case where a debt actually existed, and in which the United States was entitled to priority.

In examining the other authorities cited by appellant, on pages 21 and 22, it is obvious that either there was a fixed debt at the time of adjudication or taxes were involved, or a bond was issued by a bonding company running to the United States, all of which are entirely different from the state of facts involved in the case before this Court.

Appellant cites the case of *Bramwell vs. United States Fidelity Company,* 299 U. S. 483, in their brief on page 26. This is a case where a bond running to the United States was the subject matter, and where the surety takes the preference which the United States should have had under Section 3466 of the revised statutes, after the surety on the bond paid the United States and received an assignment of the rights of the United States against the principal. Appellant contends, that the "established rule of liberal construction requires that the priority act be applied having regard to the public good it was intended to advance. Its application is not to be narrowly restricted to the cases within the literal and technical meaning of the words used."

This contention is not tenable. In the *Bramwell* case there was a fixed liability by reason of its bond. In the case at bar, the liability was not fixed until four months after adjudication in bankruptcy, and then not until the Government paid the bank and took the assignment of the note, not as a surety, but as an insurer. Certainly a loan made by the bank to the brewing company and evidenced by a promissory note, which said note was a negotiable instrument, was a direct contract between the bank and the brewing company, and said transaction could not be deemed an equitable debt in favor of the United States under Section 3466 of the revised statutes.

Subdivision (i) of Section 57 of the Bankruptcy Act (11 U. S. C. A., 93 Subd. (i)) provides that:

> "Whenever a creditor whose claim against the bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharges such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditors."

This section, it will be observed, provides for the filing of the claim by (The United States or the Administrator, as the case may be) in the name of the creditor, (The California Bank) and for the subrogation to the rights of the principal creditor (The California Bank). The record shows that the claim as filed, was filed by the United States of America in its

own name and right and not in the name of the creditor (The California Bank).

Appellant contends the Canon of construction that the rights of the U. S. are not affected by general words of a statute, applies to the Bankruptcy Act, but cites no authorities for their contention.

The case of *United States vs. California,* 297 U. S. 175-186, holds:

> "The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated (See *Baltimore National Bank vs. State Tax Commission of Maryland,* 297 U. S., page 209, decided same day)."

In the *Nardone vs. United States,* 302 U. S. 379, 383, the court on page 383 said:

> "The canon that the general words of a statute do not include the Government or affect its rights unless the construction be clear and indisputable upon the text of the act does not aid the respondent. The cases in which it has been applied fall into two classes. The first is where an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest. A classical instance is the exemption of the state from the operation of general statutes of limitation. The rule of exclusion of a sovereign is less stringently applied where the operation of the law

is upon *the agents or servants of the Government rather than on the sovereign itself.*"

From an analysis of the above entitled cases and the argument advanced by the United States when applied to the facts of the case at bar, the only reasonable conclusion and deduction that can be reached, is that they do not apply to and have no bearing, weight, or effect on, or in any way limit, enlarge upon or defeat subdivision i of Section 57 of the Bankruptcy Act, *Supra.*

Conclusion

In conclusion our contention is the U. S. did not acquire any greater rights than the Calif. Bank and Appellee feels that the question certified by the United States Circuit Court, Ninth Circuit, to this court should be answered in the negative, and that the claim of the United States of America be denied priority.

Respectfully submitted,

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March, 1939.